

**UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.**

**Before
E.E. GEISER, L.T. BOOKER, J.R. PERLAK
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**ENRIQUE LOPEZ, JR.
STAFF SERGEANT (E-6), U.S. MARINE CORPS**

**NMCCA 200900571
GENERAL COURT-MARTIAL**

Sentence Adjudged: 13 May 2009.

Military Judge: LtCol David S. Oliver, USMC.

Convening Authority: Commanding General, 3d Marine
Logistics Group, Okinawa, Japan.

Staff Judge Advocate's Recommendation: LtCol J.J. Murphy
III, USMC.

For Appellant: Mr. Brian Pristera, Esq; Maj S.B. Patton,
USMC; LT Ryan Santicola, JAGC, USN.

For Appellee: LT Timothy H. Delgado, JAGC, USN.

15 June 2010

OPINION OF THE COURT

**IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS
OPINION DOES NOT SERVE AS PRECEDENT.**

PER CURIAM:

A general court-martial convened at Camp Butler, Okinawa, Japan, with officer members convicted the appellant, contrary to his pleas, of larceny and making a fraudulent claim, in violation of Articles 121 and 132, Uniform Code of Military Justice, 10 U.S.C. §§ 921 and 932. The approved sentence was confinement for one year and a bad-conduct discharge.

On appeal, the appellant asserts that his counsel was ineffective when he failed to request the compelled testimony of a person characterized by the appellant as "a material and exculpatory witness who refused to be involved with the trial." After carefully considering the record of trial and the pleadings of the parties, we conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Background

In 1998, the appellant began dating Ms. Maricella Arevalo-Benson (MAB). In 1999, the couple had a daughter, AL, out-of-wedlock. The appellant acknowledged paternity, began cohabiting with MAB, and provided child support. The household also included DP, who was MAB's daughter from a prior relationship. In December, 1999, the couple obtained a court order awarding each parent joint custody of AL. The order was obtained, at least in part, to enable the appellant to claim dependent allowances from the Government.

In September 2004, the appellant executed permanent change of station (PCS) orders for an unaccompanied transfer from Miramar, California, to Okinawa, Japan. Prior to departure, the appellant went to the Installation Personnel Administration Center (IPAC) and completed a transfer data sheet that was used to document travel and transportation allowances for the appellant's then 5-year-old daughter, AL, to relocate from her current residence in Perris, California to a new residence in Pacifica, California, some 380 miles to the north.

The appellant executed his orders and, following his arrival in Japan, completed and submitted a travel claim seeking reimbursement for, *inter alia*, his daughter's travel from Miramar to Pacifica. In July 2006 and January 2007, the appellant submitted Dependency Applications (NAVMC 10922) in which he indicated that his daughter was living in Pacifica in the custody of her maternal grandmother, Ms. Lucy Arevalo. From September 2004 through June 2008, the appellant collected basic allowance for housing (BAH) at the "with dependents" rate for Pacifica. The zip code for Pacifica rates the second highest BAH payments.

Evidence at trial indicated that AL had never resided in Pacifica. Record at 288, 323, 335. During cross-examination, the appellant acknowledged that while he knew this to be the case at the time of trial, he did not know it during the charged

timeframe. Record at 454. At trial, the defense actively pursued an affirmative mistake of fact defense.

Ineffective Assistance of Counsel

The appellant asserts that his trial defense counsel was ineffective when he failed to request the production of a civilian witness who refused to cooperate with the defense. The witness, Ms. Arevalo, is MAB's mother and, according to the appellant, was AL's primary caregiver during the time period AL was in Pacifica. Appellant's Brief and Assignment of Errors of 29 Jan 2010 at 12. The appellant acknowledges that a civilian cannot be subpoenaed to testify at a court-martial held in Japan. He nonetheless avers that his counsel was ineffective when he failed to explore alternate means such as remote testimony or a deposition. The appellant claims that Ms. Arevalo's testimony was material and relevant because her testimony would have countered three key prosecution witnesses regarding where AL lived in September of 2004 and where the appellant thought she lived during much of the charged time period.

In order to prevail on a claim of ineffective assistance, the appellant must overcome the strong presumption that his counsel acted within the wide range of reasonably competent professional assistance. *Strickland v. Washington*, 466 U.S. 668, 689 (1984). The appellant has the burden of demonstrating: (1) his counsel was deficient and (2) he was prejudiced by such deficient performance. *Id.* at 687. To meet the deficiency prong, the appellant must show that his defense counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* To show prejudice, the appellant must demonstrate that any errors made by his defense counsel were so serious that they deprived him of a fair trial, "a trial whose result is reliable." *Id.*; *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987). The appellant "'must surmount a very high hurdle.'" *United States v. Smith*, 48 M.J. 136, 137 (C.A.A.F. 1998)(quoting *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997)).

In addition to the record of trial, we have before us declarations made under penalty of perjury from the appellant and Daniel Delacruz¹ and from the appellant's trial defense

¹ Declaration of Staff Sergeant (SSgt) Enrique Lopez, Jr. of 25 Jan 2010; Declaration of SSgt Daniel Delacruz of 28 Jan 2010.

counsel.² This court generally lacks the competence to resolve a post-trial ineffective assistance of counsel claim based solely on "conflicting affidavits" and the record of trial. We may resolve the allegation, however, if the post-trial claim is (1) inadequate on its face, or (2) although facially adequate is conclusively refuted as to the alleged facts by the files and records of the case. *United States v. Ginn*, 47 M.J. 236, 244 (C.A.A.F. 1997).

Having carefully reviewed affidavits from the appellant, the appellant's friend, Staff Sergeant Daniel Delacruz, and the trial defense counsel, we find no material factual dispute. All three affidavits reflect that Ms. Arevalo made an initial statement to investigators indicating that AL had lived with her in Pacifica during a portion of the charged time period. They also agreed that as trial approached, Ms. Arevalo refused to cooperate with the defense and refused to even speak with trial defense counsel on the telephone. There is no relevant discrepancy between the factual scenarios proffered in the affidavits. We find, therefore, that we are able to resolve the appellant's assignment of error without recourse to further fact finding.

At issue is whether, under the circumstances described, the trial defense counsel's decision not to further pursue Ms. Arevalo's testimony was a reasonable tactical decision. We find that it was. As noted in the background section above, there was no evidence that AL ever actually lived in Pacifica. The consistent defense theory throughout the trial was that at the time the charged claims were filed, the appellant had been wrongfully misled by his greedy girlfriend MAB into mistakenly believing that AL was living in Pacifica. During cross-examination the appellant acknowledged that he knew at the time trial that his daughter never lived in Pacifica. Record at 454. This mistake of fact theme was also the trial defense counsel's primary focus during closing argument. *Id.* at 560.

In view of the defense theory of the case, Ms. Arevalo's testimony that AL actually lived in Pacifica would have stood in direct contradiction to all of the other evidence in the case to include the appellant's own admission that he currently knew that AL had never, in fact, lived in Pacifica. Such testimony would have added little or nothing to the mistake of fact defense theory of the case.

² Affidavit of Captain Timothy D. Martin, USMC, Trial Defense Counsel, of 21 May 2010.

Given Ms. Arevalo's strong reluctance to repeat her prior statement under oath at trial and considering the limited value Ms. Arevalo's testimony would have had with respect to the defense mistake of fact theory, we find that the trial defense counsel's decision not to exhaustively pursue evidence from an uncooperative witness was a reasonable tactical decision consistent with the other facts in the case. We hold, therefore, that the appellant has failed to meet his burden to show that his counsel's decision not to further pursue Ms. Arevalo as a witness was erroneous.

Conclusion

The findings and the approved sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court